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CAPE OF GOOD HOPE.

CORRESPONDENCE

WITH THE

JUDGES OF THE SUPREME COURT

ON CERTAIN MATTERS CONNECTED WITH THE

ADMINISTRATION OF JUSTICE IN
THE COLONY.

Presented to both Houses of Parliament by command of His Excellency the Governor.
MAY, 1859.

CAPE TOWN:
SAUL SOLOMON & CO., STEAM PRINTING OFFICE, LONGMARKET-STREET.

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CAPE OF GOOD HOPE.

CORRESPONDENCE with the JUDGES of the SUPREME COURT on certain matters connected with the ADMINISTRATION of JUSTICE in the COLONY.

Presented to both Houses of Parliament by command of His Excellency the Governor.
MAY, 1859.

No. 1205.]

Colonial Office, October 16, 1858.

To his Honor the Chief Justice.

SIR,—I have the honor, by desire of his Excellency the Governor, to forward to you a copy of a letter which I have this day addressed to the Puisne Judges of the Supreme Court, requesting their opinion upon certain matters connected with the administration of justice in the colony, and to express to your Honor the desire of his Excellency to be favored with your opinion upon the same subject, upon your return from circuit.

I have, &c.,

RAWSON W. RAWSON,
Colonial Secretary.

No. 1206.]

Colonial Office, October 16, 1858.

The Hon'ble Mr. Justice BELL, &c.

SIR,—In the absence of his Honor the Chief Justice, I am directed by his Excellency the Governor to address you, and to request that the judges of the Supreme Court will favor his Excellency with their opinion upon the following points connected with the administration of justice in the colony :

First, The mode of prosecution in the circuit courts and courts of resident magistrates; the expediency of continuing the office of clerks of the peace, and, if so, in what places; the qualifications, if any, that should be required from those officers, and the expediency of permitting them to undertake private practice.

Second, The constitution and duties of the office of clerks of the court by whom the evidence in courts of resident magistrates should be recorded; and the description of cases, civil and criminal, in which it is advisable that the evidence should be taken down.

Third, The system of serving criminal and civil process in the superior and inferior courts; the constitution and emoluments of the offices of high sheriff, deputy sheriff, chief constable, and messenger of the resident magistrates' courts.

Fourth, The expediency of continuing the present combination of the office of high sheriff with that of master of the Supreme Court.

I forward, for the information of the judges, the replies which have been received from the several resident magistrates, to a circular, inviting their opinion upon the amalgamation of the offices of deputy sheriff and messenger of the resident magistrates' courts.

I have, &c.,

RAWSON W. RAWSON,

Colonial Secretary.

Chambers, Cape Town, 30th November, 1858.

To the Hon'ble Colonial Secretary.

SIR,—It will be most convenient to myself, and, I trust, equally satisfactory to his Excellency, if, in offering my remarks on the inquiry solicited by his Excellency in your letter addressed to the judges, of the 16th October and 15th November ultimo, I do not follow *seriatim* the several questions set forth in those letters; but submit, for his Excellency's consideration, the principles which I deem it necessary and expedient to observe in regard to those several offices connected with the administration of justice, and the mode in which those principles can be best carried into operation.

The first office which will, then, come under review will be that of the Master of the Supreme Court. That office was first created by the Charter of Justice in 1827, and in the dispatch of the Colonial Secretary (Lord Gode-rich) of August, 1827, which transmitted that charter, it is stated "that the duties of the Master will be to act as the general referee of the court, for the purpose of examining accounts, making computations, or investigating uncontroverted matters of fact in which his co-operation or assistance may be required. He will also perform any other duties which the court may annex to his office. The commissioners of inquiry, upon whose report the views of the Secretary of State were wholly founded, anticipate that these functions will not engross his time, but will leave him leisure to act as commissioner at the court of requests."

This court of requests was not carried into operation (the courts of resident magistrates having continued to exercise a limited jurisdiction); but by the 103rd, 104th, and 105th Ordinances, the Master at once succeeded to and exercised the functions of the former Orphan Chamber. The registration and examination of all wills, the supervision of all intestate estates, and the administration of all moneys belonging to minors, and forming the so-called Guardians' Fund, all devolved upon him. The amount of the latter fund is (as I am informed), about £250,000.

But, in addition to the very responsible duties of that department, the Master of the Court has also become (under the provisions of the Insolvent Law) the sole commissioner or judge in insolvency. All meetings in Cape Town are held before him, and in the country districts before the resident magistrates, under his supervision; all incidental questions in proof of debt, and questions arising between the insolvents, the creditors, or the trustees, are, in the first instance, submitted to and decided by him. And these duties (with the increased population and amount of mercantile transactions throughout the colony) have been daily growing in amount and importance, so that any person in any way concerned with these departments will admit that it requires at present all the time and attention which any person of intelligence and industry can possibly bestow, in order efficiently to discharge the multifarious and various duties belonging to these branches of offices. A single reference of accounts in a cause, *Still versus Norden*, took up about six weeks of the former Master's almost daily attendance.

It follows from these premises that it will be quite impossible to expect any person holding these combined offices to be able properly to discharge any further

or additional duties, and that consequently, the office of sheriff could not be attached permanently to that of master without serious injury to the efficient discharge of the duties of both offices. But, moreover, the duties of these respective offices are of such a nature as would, in many instances, be incompatible with each other. The master frequently appears before the court either as plaintiff or defendant in various causes arising. The judgments of the court thereon must always be left for execution with the sheriff, who is also charged with the process of the court, and the frequent substitution of a special officer to be charged with the performance of those duties is necessarily attendant with delay and additional expenses, and is exceedingly inconvenient in practice; so that both, on general principles, and from the accumulation of those important duties, I am decidedly of opinion that the Master of the Court should not be charged with any other duties than those now attached to his office.

The duties of the sheriff are next to be considered, and these appear to me to be far more important, and to require far more time and attention than is generally supposed. He is charged with the execution of every judgment, civil or criminal, and of every order or decree passed by the court; and for the performance of these duties by the Charter of Justice, he has "the appointment of deputies over the whole colony, for whose acts he is entirely responsible."

The number of circuit courts has already increased to twenty, and two or three more appear only to await the construction of better roads, and the preliminary judicial arrangements, to be still further added to that list. In all these places it is essentially necessary that deputy sheriffs should be present in order to attend the circuit courts, instantly to give effect to the judgments of the courts. For all their acts, the sheriff is still responsible, as the writs are directed to him as well as to his deputies; and the supervision of all these duties, independent of those emanating directly from the Supreme Court, appear to me fully to engross the daily attention of an active and intelligent officer, the levies in one quarter of the year 1857 having amounted to the sum of £15,000. The sheriff (exclusive of his fixed salary of £600 paid by the Government) charges certain fees in the execution of the judgments and orders of the court, out of which he remunerates two or more sheriff officers acting under his direct authority in Cape Town and its vicinity. A certain surplus, however, annually arises from this fund after the payment of these officers, and it seems doubtful to me whether that surplus is due to the Government or whether it does not form part of the legitimate fees to which the sheriff is entitled.

The deputy sheriffs in the country districts receive no salary whatever, and, strictly speaking, are not servants of the Government, but mere substituted agents of the sheriff, to whom alone they are responsible. The only perquisite they receive consists in the fees on serving processes and executing writs within their respective districts, and where the amount of population and business is considerable, they have derived a tolerable income; but in the majority of country districts the office hardly yields sufficient to defray the expense of horses and forage, which the deputy sheriff must be provided with to meet any sudden emergency; and in those places the sheriff has (I believe) had considerable difficulty to find men of respectability and credit to take the office. From these data it follows that the duties of messenger of resident magistrates' courts could not, as a matter of course, be demanded of the deputy sheriffs. Some of the latter may probably be inclined to take this additional duty, thereby increasing their income; but several of them (I have no doubt) would deem those duties derogatory to the more responsible and dignified office of the "sheriff depute," and it would hardly be just to those deputies who have otherwise merited the confidence of the sheriff to remove them on that account from their offices, and to fill their situations by persons of an inferior station in society. There seems to be no possible incompatibility in one individual holding both appointments; but the anomalous position of the deputy sheriff would either compel the Government to confer the office of messenger on those previously holding the office of deputy sheriff, or compel the sheriff to constitute as his deputy the messenger,

appointed by the Government, in which case the sheriff would very justly consider himself relieved from the responsibility now resting upon him for every act of commission or omission of his deputies, and would virtually entail that responsibility on the local government.

The office of the clerk of the peace has next to be considered. This office is (in my opinion) of far greater importance, and is more essential in a proper and efficient administration of justice, than, I fear, has generally been considered.

On the first promulgation of the Charter of Justice in the year 1827, the mode of prosecuting crimes was very fully considered by the Secretary for the Colonies (Lord Goderich), who, in his dispatch, dated 5th August, 1827, gives the most satisfactory grounds upon which Her Majesty's Government resolved to place the prosecution of all crimes entirely in the uncontrolled power of the Attorney-General; and to enable this officer to obtain the necessary information of all offences, to carry on the extensive machinery for tracing such crimes from one district to another, and to enable him properly to bring up for trial all such offenders, the Secretary of State expressed it as his opinion, "that to assist the Attorney-General in this general superintendence, the clerk of the peace in Cape Town and the various clerks of the peace in the country districts must be placed under his control, and must be directed to maintain a continued correspondence with him,—making the office of the clerk of the peace in Cape Town the central office for such correspondence." Under this direction, clerks of the peace were very generally appointed at the comparatively few magistracies which then existed throughout the colony; but, gradually, instead of their number having kept pace with the increase of the magistracies, the latter have now been swollen to about forty-five, spread over every part of the colony, while the number of the clerks of the peace have been reduced to twelve or thirteen men, some of whom are even made to officiate in several distant magistracies; the clerk of the peace at Swellendam officiating also at Caledon and Riversdale; and the clerk of the peace of Alice also acting for Fort Beaufort, and (at very great inconvenience both to the public officer and the service) likewise at Queen's Town.

I do not hesitate to affirm that this state of things tends very seriously to impair a proper administration of justice in the colony, and to render the repression and prevention of crimes extremely uncertain and doubtful, and my experience both in this colony and at Natal has more and more strengthened my deliberate opinion that to enable the Attorney-General properly to discharge his important trust over the wide range of this colony, he must have a staff of efficient officers at the seat of every magistracy directly under his control, and independent of, and distinct from, the local magistrates. I am well aware that, in the year 1845, when a very full inquiry was made by the Legislative Council into the judicial system, a strong impression was expressed by the majority of that Council that this office (of clerk of the peace) might fitly be done away with, and that even the minority of the Council, at the head of whom the Attorney-General was found, expressed, as their opinion "that these officers (the clerks of the peace) were not an essential part of the system of public prosecution; that those duties might more cheaply and as efficiently be performed by other officers, and that the clerks of the peace should be abolished!! By this means a saving of £3,966 per annum would be effected, which would go far towards covering the expense of the new magistracies, so much required."

And I should also add that, differing (as I unfortunately did) in the views suggested by both committees of the Council as to the best means of providing for more frequent and less expensive circuit courts, I stated in my reasons for differing with the minority "that I agreed with the other members in the view entertained by them as to the expediency of establishing more numerous and efficient magistracies, and in the mode suggested of supplying those appointments by the reduction of the clerks of the peace."

It is, however, due, both to the minority of the Council who thus expressed these opinions, as well as to myself (who then expressed my general concurrence in their views) that I should submit to the candid consideration of his Excellency

(on reference to the printed report of the proceedings of those committees) that these proceedings will clearly show that the object which the then governor (Sir P. Maitland) appeared to have in view, when calling for that inquiry, was to reduce the great expenditure of the judicial system and circuit courts, and yet to make some provision for an increased magistracy; the number of magistrates over the whole colony being at that time only *nineteen*! It certainly was in that view of the question that I did not deem it expedient to dissent from the strongly-expressed opinion of the minority of the council on the question of the clerks of the peace; but I feel confident that the experience of the last thirteen years will have satisfied the Attorney-General that the prosecution of crimes has not improved in those districts where no clerks of the peace have been placed, and that, on the contrary, the inquiry into and the preparation of the preliminary examinations (where everything has been left to the magistrates) has added considerably to the difficulties of his responsible department.

I think I may, with confidence, now appeal to that functionary for a corroboration of this my opinion; but, if I should even be disappointed in this anticipation, I feel it to be my duty to reiterate my firm conviction that the administration of justice throughout this colony will never be in a sound and satisfactory state, unless the Attorney-General have a staff of agents (by whatever name they may be called, and that of clerks of the peace appears as comprehensive as any) placed at the seat of every magistracy, who shall, by every post, communicate directly with his office in Cape Town, fully reporting to him every occurrence connected with the prevention and punishment of crimes during the week past; who shall, moreover, perform all the ministerial functions which, by the laws and usages of England, generally devolve on coroners; who shall direct and be responsible for the conduct of every criminal case, and transmit all informations and documents to the Attorney-General which are necessary for him to frame his indictments.

And I not only view these appointments as essential in a due administration of justice, as respects those districts in which circuit courts are held, but more particularly do I hold them to be essential in those districts which, from their isolated situations, are rarely visited; as I consider that officers exercising those functions will always, in such places, prove a necessary and essential check, preventing any undue exercise of authority by the resident magistrates; but I am, moreover, of opinion that these persons so placed under the Attorney-General will thereby acquire such an acquaintance with the judicial system, and the modes of criminal procedure, as would best qualify them for subsequently holding the office of magistrate, and that the executive government would thus derive the advantage of having a number of forty-five persons, from amongst whom a selection could be made to fill up the vacancies in the magistracies according to the ability they disclose in the discharge of their duties, of which the Attorney-General will be the best judge.

I am aware that an objection will readily be started on the ground of the heavy additional expense which this would entail upon the revenues of the colony; but to answer that objection, it should be borne in mind that when, in 1845, the necessity for additional magistrates was felt and admitted, we were hardly prepared to find that the number (then limited to nineteen) should, within twelve years, be increased to forty-five, and this not carried out for any theoretical views of the local government, but urged by the frequently expressed wishes of the community by their representatives in Parliament. The very favorable view which our finances of late years have presented appears even to have warranted the reduction of large legitimate sources of revenue, so that we may reasonably infer that the Houses of Parliament would not hesitate to sanction any moderate expenditure, if, in principle, they are made sensible of its expediency and justice; and in carrying out these principles, I would respectfully submit that this provision might be made at an additional expenditure of a sum not exceeding £3,500, an amount which ought not for a moment to be considered if the advantages of such a system be as decided as I feel them to be.

To explain this estimate, I take the liberty of considering that there would be forty-five clerks of the peace (being equal to the present number of magistracies); of these there are about fifteen whose duties, from the extent of the districts (and some who are already in the enjoyment of the like sum), who might be appointed at £200 per annum. The remaining thirty should, for the present, only receive £100 per annum, so that this account would stand thus:

Fifteen at £200	..	..	..	..	£3,000
Thirty at £100	..	..	..	..	3,000
					£6,000

There are at present, I believe, twelve clerks of the peace, varying in the receipt of £100 to £200. These amounts, together with the additional costs of their traveling expenses (which is not an inconsiderable item) make up about £2,500, which would thus leave, as before stated, about £3,500 to be provided for; and although the amount of £100 might appear insignificant at first sight, yet I would fain hope that young men who have served their time in attorneys' or judges' offices would be found ready to take this emolument, giving them thereby a certain status and advantage in the private practice which they might also carry on in the districts to which they are appointed. I would therefore earnestly hope that his Excellency, if feeling how much really depends on this branch of the public service to ensure a liberal and efficient administration of justice over the whole colony, will not be deterred from submitting this expenditure to an enlightened Parliament.

I believe these remarks embrace all the points to which the attention of the judges has been called, with the exception of an inquiry as to the proper persons who, in our opinion, should take down the notes of proceedings before the resident magistrates. On that subject I entertain no doubt that the resident magistrate who examines the witnesses, and upon whose evidence his judgment is presumed to be given, should either note down personally the evidence brought before him, or at least be responsible for the manner in and fidelity with which it is taken; for how could the magistrate otherwise be satisfied that the evidence has been correctly taken, or bear out the judgment he has passed.

Another point might also be submitted to the consideration of his Excellency,—namely, if the acquirements or previous studies of the clerks of the peace were such as not to give the Attorney-General sufficient confidence as to the mode in which the prosecutions of trials before the circuit courts are conducted, whether those cases could not be entrusted to some of the barristers who generally attend the sittings of the circuit courts. This is, however, a matter upon which I would only observe that the necessity of such an appointment must entirely depend on the stamp of persons who may be found for the office of clerk of the peace, there being some of those at present acting as such, who are quite equal to the conduct of such trials; and others again, sadly deficient. This would not, however, in any way affect the question as to the necessity of having, during the whole year, an efficient officer on the spot, in every magistracy, ready to inquire into every offence, and report the same promptly and fully, to prepare all the evidence necessary to convict those who are guilty of crimes, throughout the colony.

I have, &c.,

H. CLOETE, Senior.

Supreme Court Chambers, 11th December, 1858.

The Honorable the Colonial Secretary.

Sir,—The judges having considered it most convenient to give their opinions and suggestions separately on the topics contained in your letters of the

16th October and 15th November last, I have the honor to submit, for the information of his Excellency the Governor, the annexed observations, in which my views are fully stated on the several questions which have been brought under our consideration.

I have, &c.,

E. B. WATERMEYER.

Observations on Prosecution, Duties of Magistrates' Clerks, Duties of Sheriff, Service of Process.

I. "The mode of prosecution in the circuit courts and courts of resident magistrates, the expediency of continuing the office of clerk of the peace, and, if so, in what places, the qualifications, if any, that should be required from those officers, and the expediency of permitting them to undertake private practice."

1. The question has reference to the "mode of prosecution" in the circuit courts and courts of resident magistrates. It does not imply, if I understand it rightly, any change in one of the fundamental doctrines of the criminal jurisprudence of the colony, that of public prosecution.

I confine myself, at present, to prosecutions in the circuit courts, where the trial takes place before a judge of the supreme court and a jury, upon an indictment framed by the attorney-general from the preparatory examinations taken before the committing magistrate.

Before, however, giving my opinion on the expediency of continuing the office of clerk of the peace, I would wish to draw attention to the principles on which every system which requires the maintenance of a responsible public prosecutor for the administration of criminal law must be based. These principles are briefly the following:

Every subject injured by the commission of a crime has a right to claim that the public authorities shall examine into his complaint and pursue and punish his aggressor at the public expense. Every individual accused of a crime has a right to demand that a public and responsible officer shall be entrusted with the prosecution, rather than that this important public duty should be relinquished to the malice, caprice, or interest of any person who has been or believes himself to have been injured. Finally, the public have a right to expect that there shall be, on the one hand, in as far as possible, an absence of personal feeling in the pursuit of offenders, and on the other that there shall be as little probability as possible of the defeat of justice which would result from the abandonment of prosecutions, either through indifference or from corrupt causes.

Where the public prosecutor declines to proceed, after the investigation of a complaint, then only should the injured person, if dissatisfied with this decision, be at liberty to prosecute, and in this case at his own expense.

It is essential, further, to the nature of responsible public prosecution that the committing magistrate, who in the first instance weighs the evidence on which the prosecutor claims that the alleged offender shall be brought to trial before a jury, and shall be committed to prison, or what is equivalent in law, be held to bail until such trial, shall be wholly independent of the prosecutor and the prosecutor of him, equally as that the prosecutor who asserts, and who is prepared to prove, that a prisoner is guilty, shall be completely independent of the jury and the judge, who will decide on the evidence which he produces, and they of him.

Unless these various duties of prosecution, committal, and trial are wholly independent of each other,* and the departments of the functionaries engaged in

* I need scarcely add that I wholly disapprove of the power of committal given to the attorney-general by section 45, of Ordinance 40. This power has, I believe, never been exercised in the colony; certainly not since the present attorney-general has held the office. There should be no prosecution, public or private, before a superior court, unless there be first a committal by a magistrate.

the performance of these duties are kept perfectly distinct. There may exist, indeed, a species of inquisitorial investigation, in which judicial authorities of various degree conduct prosecutions with the object of establishing guilt, which is the system adopted in some of the continental states ; but public prosecution, in its true sense, would not exist.

In the supreme court, this system of public prosecution is fully carried out. In those of the circuit districts, where the clerk of the peace is as independent of the resident magistrate, who is ordinarily the committing magistrate, as the attorney-general and the clerk of the peace in Cape Town are of the resident magistrate of the Cape division, where the clerk of the peace conducting the preparatory examination is the subordinate officer of no functionary in any way connected with the criminal proceedings, with the exception of the attorney-general only, the system of public prosecution likewise exists in its purity.

But some appointments which have been made of late years exhibit a serious deviation from the principles which have been stated above. Clerks of resident magistrates have, with an addition to their salaries, been permitted, as acting clerks of the peace, to conduct preparatory examinations and to prosecute in the circuit courts.

The two offices of clerk of the peace and clerk of the resident magistrate are, in my opinion, incompatible with each other. It would be equally sound in principle to impose the duty of prosecution before the circuit court on the resident magistrate himself, who has committed the prisoner for trial, as on his clerk, whose chief obligation is obedience to the resident magistrate's orders in all official proceedings.

The intimate connection between the magistrate and his clerk is such,—either the magistrate controlling the clerk, or the clerk influencing the magistrate,—that the magistrate, when called on to commit for trial, becomes, when he ought to be independent, a subordinate of the prosecutor through his clerk, who, as clerk of the peace, is or should be bound to obey the attorney-general alone ; or the prosecutor, the attorney-general's deputy, being under the control of his official superior, the magistrate. The attorney-general, the responsible public prosecutor of the colony, loses, to a certain extent, the complete direction of the prosecutions, which cannot be fitly carried on, unless his discretion be unfettered, and there be no intermediate power between him and his subordinates,

If these views be correct, it is clear that there must be an officer belonging to the department of the attorney-general in each magisterial district, to conduct preparatory examinations before the magistrate's court ; to collect evidence for this purpose, and for the prosecution of crimes before the circuit court ; to obey the directions of the attorney-general in the proper preparation of a case for trial. As this officer cannot be fitly the magistrate or the magistrate's clerk, he must be, under whatever title, what we have been accustomed to call a clerk of the peace.

The performance of the duties which have been detailed does not necessarily include the conduct of prosecutions in the circuit courts. The person who conducts the prosecution on circuit need not be resident in the district ; but he who prepares the case for the prosecution, the solicitor for the crown, must be so resident. There are some clerks of the peace of eminent ability, quite competent, from their knowledge of criminal law and power of placing facts before a jury, to cope with any counsel ; but, without any disrespect to the majority of the gentlemen who act in this position, it must be conceded that, though they are quite equal to ordinary cases, the duties of prosecution in court would be better performed by those who are duly qualified by previous training and constant professional practice for these duties. If circuit courts be extended to a still greater number of district towns, as is probable, the deficiency in this respect will become the more apparent. Acquittals of prisoners who ought to have been convicted have taken place, not unfrequently, from the inexperience of gentlemen who have acted as clerks of the peace, and their inability to marshal the evidence at their command when opposed by some able counsel.

It would be an improvement in the conduct of circuit prosecution, provided the revenue would admit of the change, if the attorney-general selected two of the counsel on circuit to act as deputy prosecutors at the alternate circuit towns. If the papers relating to the criminal calendar were in the possession of the prosecuting counsel at the circuit town before that at which he will be called on to prosecute, he could easily master the evidence in ample time for the performance of his duties.

In addition to the more efficient administration of criminal justice, a great benefit would be secured to the general judicial proceedings on circuit; as thus, at least, two barristers will be induced to be present at each circuit town. It need scarcely be added that the presence of members of the bar is of the highest importance to the court, as well as to suitors. Probably the sum of £150 per circuit to each of the barristers thus engaged, though it cannot be called a remuneration for the services to be performed, would be sufficient to induce members of the bar to undertake this duty. They would trust for further emolument to the criminal defences in the alternate towns, and to the civil business which each circuit would in some degree afford.

As to the mode of prosecution in circuit courts, therefore, I am of opinion that the office of clerk of the peace should not be abolished; but that, as soon as the revenue shall permit, this officer's duty, in respect of circuit criminal business, shall be confined to the preliminary investigation and preparation of cases for the circuit,—the duty of prosecuting in court being entrusted to members of the bar deputed by the attorney-general, and guided by his general directions.

2. I now proceed to the mode of prosecution in the courts of resident magistrates.

If it be important in the superior courts—where, besides the judge, there is a jury to decide on the guilt or innocence of the accused,—that the prosecutor's functions should be wholly distinct from the functions of the judge and jury, it is absolutely essential that in the inferior courts, where there is no jury, the totally dissimilar duties of judge and prosecutor shall never be merged in one person. Public opinion would be shocked if the Attorney-General in the Supreme Court, after having, through the clerk of the peace, satisfied the grand jury that sufficient evidence existed for proceeding with the prosecution, took his seat on the bench when true bills had been found, and then proceeded to conduct the prosecution, to charge the jury impaneled to try the prisoner's guilt, and, finally, on their verdict, to pass, sentence. Here there would be an independent jury, besides an educated bar, and a vigilant press,—all safeguards against the possibility of injustice by the prosecutor-judge; but, nevertheless, so grave a deviation from principle would not for a day be tolerated. In magistracies without a prosecutor independent of the magistrate's control, where, in fact, the magistrate prosecutes, there is this departure from principle in a worse degree. The magistrate in an isolated country village,—unchecked by a jury, and unwatched by either bar or press, obliged to act as judge and as prosecutor—is placed in a position unjust to himself, unjust to the public, but cruelly unjust to the prisoner.

It may be urged, and has been urged, that magistrates cannot try the more heinous offences, and cannot inflict very severe punishments. This is not quite the fact. Their powers have by a late act (20, of 1856), been much enlarged, and are quite as extensive as can safely be trusted to any judge in criminal cases without a jury. But even where the punishments are of a very slight degree,—in the cases usually denominated “summary,” of the proceedings in which no record reaches a higher tribunal, and from the decisions in which there cannot and ought not to be any appeal,—it is, perhaps, more important than in graver cases, which do undergo revision, that the accused shall be protected by the certainty that his judge has had no communication with or control over his accuser, and that the functionary who hears and acts upon the one-sided statement of the complainant, and the functionary who has to decide upon the facts which appear on both sides, have each duties to perform wholly independent of the other. When the mind is once prejudiced against a prisoner by the complainant's

tale, the tendency to assume guilt is greater where the power of punishment is small than where punishment would be more severe. The safeguards in petty cases should, therefore, certainly not be less than in those of a more serious nature.

By Ordinance 40—the law of criminal procedure, all prosecutions were conducted in the “district” courts, as well as in the circuit courts, by the clerks of the peace, the deputies of the Attorney-General. With the exception of some extension of the right of private parties to prosecute by Ordinance 73, this remained the law of the colony until Ordinance 8, of 1852, came into force.

That ordinance provided for the mode of prosecution in the courts of resident magistrates of districts when there is no resident clerks of the peace, and likewise for the conduct of preparatory examinations by magistrates in such districts. On account of financial considerations, vacancies in the office of clerk of the peace had not been supplied, and in new magisterial districts no such officers were appointed. It became necessary, in the absence of clerks of the peace, to pass an ordinance of this nature; but there can be no doubt that the provisions which the legislature were thus obliged to insert in this ordinance were at variance with the principles of public prosecution, as established in the colony on reform of the judicial system in 1827. The power given to private prosecutors to prosecute at the public expense, and the constitution of the clerk of the magistrate, who is not under the Attorney-General’s control, as the authority to decide whether “the crime or offence is within the jurisdiction of the court, and proper to be prosecuted at the public expense,” are both most objectionable legal provisions in a country where public prosecution vested in the responsible Attorney-General is the law of the land, and are not to be reconciled with such a system of public prosecution. The section which provides that in the case of the non-appearance of the prosecutor, the complaint shall not be dismissed by the magistrate “by reason merely that no prosecutor appeared on the court day appointed for appearance,” and that the “clerk of the court shall not be prevented from assisting in the conduct of the trial in such manner as shall be in his power,” plainly makes the magistrate and his clerk, and, therefore, in principle, the magistrate alone, the prosecutor in cases before the magistrate’s court. This is wholly opposed to the principles of public prosecution, and can only be justified in case of extreme necessity.

There are now three different modes of public prosecution in the courts of resident magistrates,—1, By clerks of the peace, under the Attorney-General’s sole control, and independent of the magistrate; 2, By clerks of the resident magistrate, who are in that capacity under the resident magistrate’s control, but who also act as clerks of the peace, and in this capacity ought to be under the control of the Attorney-General; 3, By private prosecutions at the public expense, with the assistance of the magistrate’s clerk, and the magistrate, in effect, as above stated, by the magistrate himself,—public prosecutions, in fact, not instituted by a public prosecutor.

This last mode of prosecution—one destitute of all the safeguards which public prosecution ought to have—is that in force, principally, in those magistracies in which there are the fewest checks *aliunde* on the magistrate: for example,—in Cape Town, Graham’s Town, Graaff-Reinet, Port Elizabeth, no prosecution, of however trifling a nature, takes place, unless instituted by the deputy public prosecutor, the clerk of the peace; yet, in all these places, there is an intelligent public, and a press, prepared to criticize all proceedings of magistrates. If, in these places, prosecutions were carried on in the irregular mode just described, it is not probable that any serious injustice or any display of prejudice would escape unnoticed. At Hope Town, Calvinia, Namaqualand, Prince Albert, and other distant places, where the magistrate may, if he pleases, be a kind of petty despot, responsible to no one, and whence a voice scarcely ever reaches a newspaper, where, therefore, the legitimate safeguards ought to be the most strictly insisted upon,—the proceedings are always under Act 8, of 1852; the office of clerk of the peace being wholly suppressed. If clerks of the peace

cannot be afforded for all magistracies, it would be more consistent with justice if the office were abolished in the larger places; but, in the remote districts, a magistracy without this officer may speedily become most inefficient in the administration of law.

From these observations it must be plain that, in my opinion, there exists a most serious defect in all the magistracies in which there are not clerks of the peace, as well for the circuit courts as for the courts of resident magistrates. But there are now forty-four magistracies, in nine of which only, there are clerks of the peace properly so called, while three have magistrate's clerks appointed to act as clerks of the peace; and if the views now submitted be acted upon, very great expense will be entailed on the colony. This is true. In no case is it possible to render this large number of magistracies efficient without considerable expense. No doubt the extension of the magistracy was imperatively demanded by the wants of the colony; but an inefficient magistracy—one based on principles subversive of the most valuable criminal institution of the colony—should not be tolerated for an instant longer than is required by the necessity of the case.

The amount of salary of the present clerks of the peace is about £2000 in twelve magistracies. To render the additional thirty-two magistracies really efficient (for without public prosecutors they cannot be called so) about £5000 more would be requisite. The usual salary for clerks of the peace has been £200 per annum, with the right of practice as attorneys before the circuit court, which has been of great value to some—of no value at all to others. At Graham's Town, Port Elizabeth, Graaff-Reinet, Colesberg, Somerset, and Beaufort, clerks of the peace, with a knowledge of law equal to that possessed by members of the legal profession practicing in these places, have it in their power to add largely to their incomes. In Clanwilliam, Piketberg, and other places, where there is litigation, such additions to salary must be merely nominal. I have considered, anxiously, whether for the sake of securing clerks of the peace, it would be advisable to appoint officers at low salaries; but I cannot think it just to place any officer to so responsible a position at a less salary than £200 per annum, except, perhaps, at some exceedingly cheap places, which are very few.

It may be worthy of consideration whether, in country places where there are regularly educated attorneys, it may not be advisable that the Attorney-General, if satisfied of their character and competency, should constitute them his deputies for prosecution in the magistrate's court and preparation of cases, and, if necessary, prosecution in the circuit court. The criminal business, on behalf of prisoners, likely to fall into the hands of country attorneys is not large, so that a certain income, of probably £100 per annum, for performing the duties of clerk of the peace in criminal prosecutions may be a sufficient inducement to professional men to undertake and fitly to discharge the functions of attorney for the crown. Probably there are not many who could be thus employed; but where this can be done it should be done, in the absence of Government clerks of the peace. This mode of meeting the difficulty appears to me to be less objectionable than the system lately adopted.

3. With respect to the qualifications of persons appointed to clerkships of the peace, the principal should be knowledge of law. The practice of appointment to clerkships of the peace of gentlemen engaged in departments of the service where their attention has not been directed to the study of law or administration of justice should not be continued without some inquiry into their competency, to the satisfaction of the Attorney-General, for the discharge of this office. The certificate of the second class in law, which will be attainable from the newly-constituted Board of Examiners, should be required for all appointments from 1860, when the first annual examination of that board will take place.

4. I am decidedly in favor of the allowance of private practice as attorneys of the circuit court, notaries, &c., to clerks of the peace. A correct discharge of their public duties will be greatly aided by an intimate knowledge of the general

course of legal procedure, which can be obtained only by civil in addition to criminal practice. The clerk of the peace of the district should, in relation to the legal practitioners of the district, be in the position which the Attorney-General holds towards the members of the bar, and should be qualified and competent to maintain that position.

II. CONSTITUTION AND DUTIES OF THE OFFICE OF THE CLERK OF THE COURT, &c.

The constitution and duties of the office of Clerk of the Court, by whom the evidence in Courts of Resident Magistrates should be recorded ; and the description of cases, civil and criminal, in which it is advisable that the evidence should be taken down.

The clerk of the court should be wholly under the direction and control of the resident magistrate. It appears to me that the duties of this officer are well defined in the Schedule B of the Magistrate's Court Act. They consist in the issuing of civil and criminal process, in keeping the civil and criminal record books, &c. Inasmuch as there is now, by law, an appeal from all civil judgments of the magistrate's court, the evidence must be taken down in all civil cases ; and the twenty-fourth rule in Schedule B provides that it shall be taken down by the clerk—necessarily subject to the direction of the magistrate.

Criminal cases, in which a certain amount of punishment is awarded, must be transmitted to the Supreme Court, under the forty-seventh section of the act, for revision ; and for this purpose the evidence is essential. Of all other criminal cases, a report must, under the forty-sixth section, be sent to the Attorney-General. As he should have an opportunity, whenever he deems it necessary, of requiring the evidence, it should be taken down in these cases also ; the clerk is the proper person to perform this duty, as in civil cases.

I would add, further, that if the clerk discharges this duty during the criminal proceedings, he cannot take upon himself at the same time the functions of *quasi* prosecutor, under Ordinance 8, of 1852.

III and IV. CIVIL AND CRIMINAL PROCESS.

The system of serving criminal and civil process in the superior and inferior courts ; the constitution and emoluments of the offices of High Sheriff, Deputy Sheriff, Chief Constable, and Messenger of the Resident Magistrate's Court ; the expediency of continuing the present combination of the office of High Sheriff with that of Master of the Supreme Court.

It is more convenient to reply to the fourth question before entering on the "system of serving civil and criminal process."

I have no hesitation, after carefully considering the question, in stating my opinion of the inexpediency of the permanent combination of the office of High Sheriff with that of Master of the Supreme Court.

The duties of the Master of the Supreme Court are very onerous. He is, as expressed in the judicial dispatch of 1827, "the general referee of the court for the purpose of examining accounts, making computations, or investigating certain controverted matters of fact." These duties, which are specially his as Master, do not engross his time ; but his additional duties, under Ordinance 6, of 1843, as commissioner in insolvency, with large powers and most important responsibilities, and his further duties as custodian and examiner of wills, and administrator of intestate estates, and special guardian of the interests of minors and lunatics, under Ordinances 104 and 105, are such as would lead me to incline to the opinion that this officer should be released from the superintendence of one of the departments last mentioned, rather than that another wholly distinct department should be likewise placed under his charge.

For these reasons alone, I should be of opinion that the arrangement by which the present Master was appointed, on an emergency, to the charge of the sheriff's office, principally because he had for many years been sheriff, should not be permanent. At the same time, it is obvious that while the master is not merely referee of the court, but the head of two above-named important departments; and as such head is frequently, as plaintiff or defendant, applicant or respondent, a suitor before the court, he ought not to be, in ordinary circumstances, the sheriff or officer whose proper duty it is, in all suits, to enforce the orders of the court.

I see no reason for any change in the constitution of the office of sheriff and the duties to be performed by him, as provided by the twenty-fifth, twenty-sixth, and twenty-seventh sections of the Charter of Justice, the thirty-seventh ordinance, and the rules of court. The Supreme Court having jurisdiction throughout the entire colony, the sheriff should be able to execute its orders and decrees for every part of this jurisdiction. This he can do only through deputies under his control and responsible to him, as he is responsible to the court and to suitors. Suitors in the Supreme Court can only look to the sheriff, the officer of that court, and ought not to be required to be content with the execution of process by persons for whom the sheriff is not responsible. The Supreme Court, too, cannot trust to the execution of its process by any person who is not wholly its officer. Its dependence is on the sheriff, as answerable for the acts of his agents, the deputies.

It was suggested by the minority of the committee of the Legislative Council on the judicial system, in 1845, that the duties of deputy sheriffs might be performed by the resident magistrates' clerks, the sheriff being relieved from his responsibility as regards these officers, and the Government guaranteeing the due performance of their duties. I cannot concur in this suggestion. If the responsibility of the sheriff in the Supreme Court for the act of his agent at Colesberg be taken away, there is no one responsible to the court for the due performance of its decrees. A Government guarantee might replace a loss to a suitor; but the power of the court over its sheriff, who should be always present at its sitting to answer for all his deputies, is gone. The clerk of the resident magistrate could be the sheriff's deputy for Supreme Court purposes only if the sheriff had the control of that appointment. If it be necessary for the purpose of the jurisdiction of the Supreme Court to retain in each district an officer who must perform the duties of the Supreme Court under the sheriff of the colony, it is plain that that officer will be the fittest person to perform the circuit court duties of sheriff—especially when the intimate connection of the supreme and circuit courts is borne in mind.

In like manner, the messenger of the magistrate's court could not be the deputy sheriff for Supreme Court process, for that office could not be under the control and in the appointment of the sheriff. No arrangement ought to be made by which the sheriff's responsibility is not fully maintained.

As to service of criminal process, likewise, I prefer the continuance of the deputy sheriffs; although I do not see any objection to the use of the chief constable, in supreme and circuit court prosecutions by the public prosecutor, for summoning witnesses in magisterial districts where there are no deputy sheriffs.

The payment of deputy sheriffs should continue to be by fees, rather than by salaries. The difference in the amount of business between the several districts would render it exceedingly difficult to apportion the salaries. Remuneration by fees seems peculiarly applicable to offices of this nature, provision being made for the periodical revision of these fees in justice to the public as well as to the deputy sheriffs themselves.

The circumstances of the different magisterial districts of the colony vary so much that I do not feel myself warranted in giving an opinion, which would be applicable to all, on the expediency of the union or separation of the offices of the chief constable and messenger of the magistrate's court.

The magistrate's messenger is the executive officer of that court, as the sheriff is of the Supreme Court. The chief constable's duties are wholly police duties, except as to the service of such criminal process of the Supreme and circuit court as may be required of him under section 23, of Ordinance 25, of 1847.

In districts where there is not much business, civil or criminal, in the magistrate's court, and where the police duties are not onerous, I can see no objection to the combination of the offices, as both the chief constable and the messenger are subordinates of the magistrate, and bound to obey his orders. But it can readily be understood that where there is a press of business, the service of process, which is remunerated by fees, will clash with the police duties, for the performance of which a fixed salary is paid. In the opinions of the magistrates which have been submitted the separation or combination of the offices is approved or disapproved, according to the circumstances of the district.

But whether or not these offices should be united in one person or kept perfectly distinct, the deputy sheriff—who is for the purposes of the superior courts the agent of the sheriff—should not perform the duties of messenger in an inferior but independent court, unless, to preserve his principal's responsibility in the superior court, he be appointed by the sheriff and no one else; and as the appointment of the executive officer of a court with which he has no connection ought not to be conceded to the sheriff, there appear to me to be serious difficulties, which I do not at present see the means of removing, in requiring the deputy to perform the functions of messenger of the magistrate's court.

E. B. WATERMEYER.

Supreme Court Chambers, 11th Dec., 1858.

Supreme Court Chambers,
Cape Town, December 13, 1858.

To the Hon'ble Colonial Secretary.

SIR,—I had the honor to receive your letter of the 16th of October, requesting, by the direction of his Excellency the Governor, the opinion of the judges of the Supreme Court, upon certain points connected with the administration of justice. Having considered with my brother judges, Mr. Justice Cloete and Mr. Justice Watermeyer, the different subjects embraced by your letter, I, as stated in my letter of the 11th November, drew up for the information of his Excellency the united opinions of my brother judges and myself; but the further information required by your letter of the 15th November, rendered it necessary, in the opinion of the judges, that we each should convey his individual opinion upon the different matters inquired of.

1. With regard to the mode of prosecution in the circuit courts and courts of the resident magistrates, I cannot but think that the principle recognized by the Ordinances No. 40 and No. 73,—namely, that all crimes should be prosecuted, at the instance of an officer, distinct from and independent of the judge before whom the prosecution is to be carried on—is a sound one. The observance of it must be one and a principal guard against abuse in the administration of the law; and I cannot better enforce my opinion on this subject than by referring to the fourth subject treated of in the dispatch of Earl Grey, of the 4th December, 1846, which has just been brought to my notice.

As to the magistrates' courts, the Ordinance No. 8, of 1852, was a departure from the principle to which I have referred. In its second section, that ordinance allows the clerk of the magistrate, in magistracies where there is no resident clerk of the peace, to issue the criminal process of the court, "upon his being satisfied that any crime has been committed," with the omission from the previously prescribed form of any prosecutor on behalf of her Majesty. In its fourth

section, this ordinance allows the magistrate, on failure of the culprit to appear upon the summons issued by his own clerk, to issue, on his own motion, a warrant for the apprehension of the party. In its fifth section, the ordinance allows the magistrate to adjudicate in the complaint, without the appearance of any prosecutor whatever, with a proviso that the clerk of the court shall not be prevented "from assisting in the conduct of the trial, in such manner as shall be in his power,"—expressions, the meaning of which is far from being obvious.

In my opinion, to vest in one and the same person the power to decide whether there should be a prosecution, to issue the process for the prosecution, and to act the different parts of prosecutor, juryman, and judge in the prosecution, must be very dangerous. Not one magistrate in a hundred can come to a decision upon such a prosecution with a free and unbiased mind, even if personal feeling or interest in the matter should be wholly out of the question. Should either of these motives exist, the most righteous judgment, under such circumstances, must be exposed to suspicion. I use the expression "one and the same person," because, in this matter, the magistrate and his subordinate clerk cannot, with propriety, be looked upon as two persons, each enjoying and free to exercise an independent judgment. The clerk cannot, at eleven o'clock, be the obedient, respectful subordinate of the magistrate, and, at twelve o'clock, be the energetic, independent public prosecutor, pursuing a course perhaps disapproved of, and perhaps offensive to the same magistrate.

In the circuit courts, the prosecution of crimes is by the clerk of the peace, either of the district in which the crime was committed, or in which the court is held, or by some one specially authorized by the Attorney-General. In case sudden illness should prevent the attendance of such a prosecutor, the magistrate of the district in which the court is held has power to appoint a prosecutor during the sittings of the court. In the circuit courts, therefore, the principle of public prosecution has been adhered to.

If this principle be reverted to generally, there will be a necessity for the existence, in every resident magistracy, of an officer having the functions of public prosecutor. Whether that officer should have the title of clerk of the peace, or some other title, I do not take upon myself to say, further, than I can see no reason to change his title, which seems very good. It occurs to me, however, that it might be advisable for the Attorney-General to give a deputation to one or more barristers, traveling circuit, to act for him at the different circuit towns; and I throw it out as a suggestion worthy of consideration. By alternating the towns at which each gentleman should act, the crown would have the services before the circuit courts of a prosecutor professionally qualified, who, by such arrangement, would have time to get up the cases before the arrival of the judge.

This arrangement would not interfere with those duties of the clerk of the peace which relate to the examinations of witnesses, marshaling the evidence, and preparing the case for the arrival of the prosecuting barristers; and there would still remain the entire duty of getting up the cases before the magistrate's court and prosecuting them to their conclusion.

Under whatever name this office of public prosecutor may be held, I would suggest that, as he will, in fact, be the deputy of the Attorney-General, he should be appointed only on the recommendation of that officer, upon his responsibility to recommend persons who, in his judgment, are qualified; and that, after the act No. 4, of 1858, shall come sufficiently into operation, no person should be appointed, even on such recommendation, who should not hold, at least, the lower certificate in law and jurisprudence, mentioned in the sixteenth section of that act.

I am not aware of any objection which occurs to permitting the public prosecutor to undertake private practice. It is no doubt possible that in cases, which, however, must be of rare occurrence, there might be a temptation to the individual to bring his powers as public prosecutor to bear upon his private practice; but the protection of the public, in such a case, will be the entire separation of the office of judge from that of prosecutor, and the danger of such an abuse of

power does not seem to outweigh the advantage, in the increased exercise of mental faculties, which private practice would tend to give.

2. The second subject of inquiry to which your letter directs attention is the constitution and duties of the clerk of the magistrate's court.

I have no means of information on this subject except what is to be gained from Act No. 8, of 1852, and the rules of the magistrate's court, to be found in schedule B to the Act No. 20, of 1856; and I have no observation to offer, so far as my information from these sources goes, except to repeat my disapproval, upon principle, of this officer having any of the powers or duties of a public prosecutor conferred upon him.

With regard to recording the evidence in the magistrates' courts, the twenty-fourth rule to schedule B, in the Act No. 20, of 1856, requires that the clerk of the court shall, in every civil case, take down the evidence. This was rendered necessary by the thirty-third section of that act, which gives power of appeal in every civil case. So long as that power, which did not exist before, continues, it would seem that the duty of taking down the evidence must also continue.

With regard to the evidence in criminal cases, though the eightieth rule in schedule B to the Act No. 20, of 1856, treats of taking evidence in criminal cases; and the forty-sixth section of that act requires the magistrate to transmit a report of every criminal case adjudicated by him to the Attorney-General, and the forty-seventh section requires the magistrate, in all cases where the punishment inflicted by him amounts to a specified degree of severity, to transmit the record of the proceedings to the registrar of the Supreme Court, for consideration by one of the judges. Not one word, however, is said about taking down the evidence. As the forty-sixth section specifies the form of report which is to be transmitted to the Attorney-General, and, in the specification, omits any mention of evidence, it would seem, so far as regards compliance with the terms of that section, that taking down evidence is not necessary in criminal cases.

Although nothing is said about taking down evidence in the eightieth rule, yet inasmuch as the judges of the Supreme Court could not perform the duty required of them by the forty-eighth section of saying whether the proceedings in the cases specified in section forty-seven have been "in accordance with real and substantial justice," without seeing the evidence upon which the magistrate's judgment has proceeded, the judges of that court have, in practice, always required that the record mentioned in the forty-seventh section should embrace the evidence.

I can have no hesitation, therefore, in saying that, in all cases which come under the forty-seventh section of the act, the magistrate should take down the evidence, that is to say, he should be responsible for the evidence being taken down correctly. Whether he should do it with his own hand or be allowed to do it by the hand of his clerk, is a question upon which I do not think it necessary to give an opinion.

Having said thus much, it amounts, after all, to an opinion that, in every criminal case, the evidence should be taken down; because it does not seem possible for the magistrate, until he shall have heard the evidence and the parties upon it, to know what will be the amount of punishment he should inflict.

3. With regard to "the system of serving criminal and civil process in the supreme and inferior courts, the constitution of the offices of high sheriff and messenger of the resident magistrate's court." According to the present system, the process of the supreme and circuit courts is served by the sheriff or by his deputy and by the chief constable, under section 23, of Ordinance No. 25, of 1847. The civil and criminal process in the magistrate's court is served by the messenger of that court, under the rules of court in schedule B to Act No. 20, of 1856. The sheriff is appointed by the Crown, and, under the twenty-fifth section of the Charter of Justice, the appointment should be renewed every year. How far this has been observed in practice I do not know. I rather think it has not been observed. By the twenty-seventh section of the Charter of Justice, the sheriff is authorized to appoint his own deputies, and it is declared that he shall be responsible for them. The officers are bound to carry out the orders of the supreme

and circuit courts. The messenger of the magistrate's court is appointed by the Governor; and under Act No. 20, of 1856, and the rules annexed to it, it is the duty of that officer to serve the civil and criminal process of the court of the magistrate, and carry out all the orders of that officer.

With regard to the emoluments of the sheriff, he is entitled to levy by law certain fees. These fees are no source of emolument to him. Out of them he pays his officers' fees according to a fixed tariff, and the surplus which remains after having done so he pays into the treasury, I believe. His own emolument is a fixed salary of £600 a-year, paid by Her Majesty. The sheriff depute has no salary, and receives no emolument from the sheriff principal; but he levies fees according to a tariff which was fixed by the Supreme Court in the year 1828. The whole of these fees he retains to his own use. If the process served has been a summons upon which the defendant has not appeared, or if the case has been settled extra-judicially, there is no one to check the application of the tariff by the deputy sheriff. If the process be one of execution, as that is returned to the sheriff principal with a note of the deputy's charges, the principal has an opportunity of seeing these charges; and I am informed that it is the practice of his office to disallow charges, which, upon the face of them, exceed the tariff; but that there are many charges which, though they present nothing on the face of them which is objectionable, may, nevertheless, be objectionable in fact if the circumstances were sufficiently known in the sheriff's office to admit of objection being taken.

With regard to the chief constable, he is appointed by the Governor under Ordinance 25, of 1847; and, as the name of his office indicates, and the ordinance declares, he is the head of the police for the district to which he is appointed. I am informed that to the duties of this office, prescribed by the Ordinance No. 25, of 1847, those of messenger of the magistrate's court, including the service of the criminal and civil process of that court, have been added, under what authority I know not. With regard to the emoluments of chief constable, I am informed that he is paid a fixed salary, which, with allowances for horse-hire and forage, is understood to cover the service of the criminal process of the supreme and circuit courts and the magistrate's court; but I am informed that the salary is by no means adequate for these purposes, and that, were it not that this officer has the service of the civil process of the magistrate's court, persons would not be found willing to accept the appointment to the office. For the service of the civil process of the magistrate's court, the chief constable, as the messenger of that court, is entitled to take to his own use the fees specified in schedule D to Act No. 20, of 1856.

According to the information which we have received, the fees which are actually levied by the deputy sheriffs are complained of as exceedingly oppressive in certain cases; and, certainly, for no very obvious reason, they are much higher than is allowed to the messenger of the magistrate's court for performance of the same duty. In this respect, perhaps, the tariff of sheriff's fees should be revised. On the other hand, the complaint is pretty general by sheriffs depute, that, notwithstanding the heaviness of fees charged by them in particular cases, the total fees they take are not, from the small amount of business, an adequate remuneration, and, were it not for certain indirect and consequential advantages derived from the tenure of their office, it would not be worth their while to accept the appointment to it. I believe this statement to be correct, and that, with the exception of two or three districts of the colony, the office of deputy sheriff does not, of itself, yield a sufficient income for the holder.

It is possible to suppose that, if the duties of sheriff depute be not confined to those required of him by the supreme and circuit courts and by the sheriff, but be combined with the duties of messenger to the magistrate in one and the same officer, there might arise collision between duties required by the supreme or circuit courts and by the magistrate's court; but I must think that the probability of such an occurrence is so small as not to influence my opinions, and, as the duties of the sheriff depute and of the messenger of the magistrate's court would seem to be in many respects very similar, I should be disposed to

recommend merging the duties of the two offices in one office, to be held under the title of sheriff depute, as the more dignified of the two, and that the tariff of fees, leviable for the duties of the combined offices, should be that sanctioned at present for the messenger of the magistrate's court.

If the thing were now to be done *ab ovo*, I should not apprehend any difficulty in making such an arrangement; but as the two offices already exist distinctly, it is very possible—indeed, certain—that difficulties will present themselves from the vested interests of the holders of the two offices, which must certainly be kept in view; but these difficulties are all resolvable into a question of pounds, shillings, and pence.

There is, however, another difficulty: the sheriff depute is an officer appointed by the sheriff, for whom the sheriff is responsible, as before observed. While this state of things continue, I do not very well see how the combination of sheriff depute and magistrate's messenger could be effected, because the sheriff might desire to remove the sheriff depute, while the Government might desire to retain the messenger.

But I am not aware of any necessity for the continuance of the sheriff's power to appoint his deputies, with the consequent liability upon him for their acts. I do not know of any reason why the Government should not take the appointment of sheriff's depute into its own hands, and relieve the sheriff of his liability for these officers. This, as far as I see, might be done, and still the office of sheriff depute be kept under the control of, and in correspondence with, the sheriff, so as to preserve all the benefits of the present centralization of arrangement and consequent unity in the performance of duties.

With regard to the office of chief constable, the inclination of my opinion is that he should not, for the service of process, either civil or criminal, be withdrawn from the proper duties of constable and head of the police force of his district; and if the salary at present allowed is too small, that it should rather be increased by a definite addition of salary than by the confusion of two offices, the duties of which must more or less interfere with each other, even in magistracies where there is little business.

4. With regard to the expediency of continuing the present combination of the office of Sheriff with that of Master of the Supreme Court, I, and one of my brethren, Mr. Justice Watermeyer, did answer an inquiry of the Government upon this subject by saying that we did not see such an incompatibility in the combination as should prevent its being made for the short period for which, as we understood, it was contemplated, viz., while the suspension of the late sheriff was under consideration of the Home Government; but I fear, from what I have read, we were misunderstood to approve of such a combination as a permanent arrangement. However, this may be, having had more opportunity of considering the matter than I had had when I gave my evidence before the finance committee of the House of Assembly in the year 1856, I am now decidedly of opinion that the combination of the offices of Master of the Supreme Court and Sheriff is highly inexpedient, and should never have taken place but for a merely temporary purpose; for I am satisfied that the proper duties of the Master of the Supreme Court, and those imposed upon that office under the Insolvent Ordinance, and under the Ordinances 103, for abolishing the Orphan Chamber; 104, for regulating the registration of wills and the administration of the estates of deceased persons; and 105, for the management of the estates of minors, lunatics, and absent persons, and of the persons of minors and lunatics, are such and so great that, if they are duly performed according to the spirit and intention of these laws as well as their express enactments, they must be sufficient to occupy the whole time and attention of one individual.

Moreover, there is an obvious incompatibility in the combination of the two offices, because the officer holding them may have, as master, to obtain orders of the court which he himself as sheriff may have to carry into execution, and under the Ordinance 105 he may, as master, have to be plaintiff in an action, and, as sheriff, have to serve and execute process in his own action.

But there is another view of the matter upon which I must speak with more

hesitation. I am not sufficiently informed as to the amount of the duties which has to be performed by the sheriff; but when I reflect upon the nature of these duties—that he has to see to the due execution of process throughout the colony, and to the due return of that execution, and the due payment over to the parties interested of the moneys realized under the executions—it would seem to me to be most probable, not to speak more strongly, that the duties proper to the office of sheriff, if discharged with that energy of supervision which they would seem to require, must be sufficient to occupy the undivided time and attention of the holder of the office of sheriff, and to make, from this point of view, the junction of the offices of sheriff and master inexpedient.

At all events, the combination is inconvenient, and therefore inexpedient upon another ground. The sheriff is, by the 3rd section of Ordinance 37, of 1828, required to give his personal attendance in the Supreme Court during its sittings. Until the combination of the two offices took place, this attendance was always given. When the combination took place, the court, on the request of the present holder of the united offices, excused him from the attendance upon his representation that it would be impossible for him to give it. The consequence is, that the court has been without an officer who could carry out its summary orders; and where reference has had to be made to the sheriff, in regard to the proper service of process and such like questions, it has happened that the proceedings of the court have had to be stopped until the sheriff could be sent for and come into court.

On every ground, I am of opinion that the two offices of master and sheriff should be disunited, as they always have been until very lately.

I believe I have now answered every inquiry made in your letter of the 16th October, so far as I feel I can do consistently with my means of information. It only remains for me to notice your letter of the 15th November.

Never having had the honor of practicing at the colonial bar, and, consequently, never having had an opportunity of coming in contact with the practical working of the judicial machinery, I could not venture to give a more practical opinion than I have hazarded in these pages. With regard to the bearing of the financial means of the colony upon the opinions I have hazarded, and the remuneration to public prosecutors and clerks of the resident magistrate, I beg very respectfully to be excused from touching upon these subjects, as beyond my capacity; but I shall not withhold the expression of my opinion that no magistrate should be appointed without the appointment being accompanied from the beginning with that of an efficient staff of officers, among the chief of whom I regard a public prosecutor.

I am quite willing to admit that the creation of effective magistracies, so as to ensure speedy administration of the law at the very doors of the inhabitants, can hardly be excessive in any community, so desirable is such an object. But the appointment of a magistrate is not the creation of such a magistracy, or a way to secure the objects contemplated by it. A magistrate in a remote locality, having the powers of prosecutor, judge, and jury, without any press or other mode of bringing public opinion to bear upon his acts, is more likely to prove a curse than a blessing, and to bring the administration of the law into hatred and contempt by the inhabitants.

I must, with all respect for the Government and the Parliament, express the opinion I have always entertained, that the creation of new magistracies, without previously providing for their entire machinery, has been precipitate and ill-advised; but, the step having been taken and being irretrievable, no amount of necessary expense should be spared to make these magistracies effective in the proper signification of that term. What that amount should be, I do not feel myself at all competent to suggest, and, therefore, I beg to be excused from making the attempt.

I trust I have not overlooked any subject to which it was desired that my attention should be directed; and have, &c.,

SYDNEY S. BELL.



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